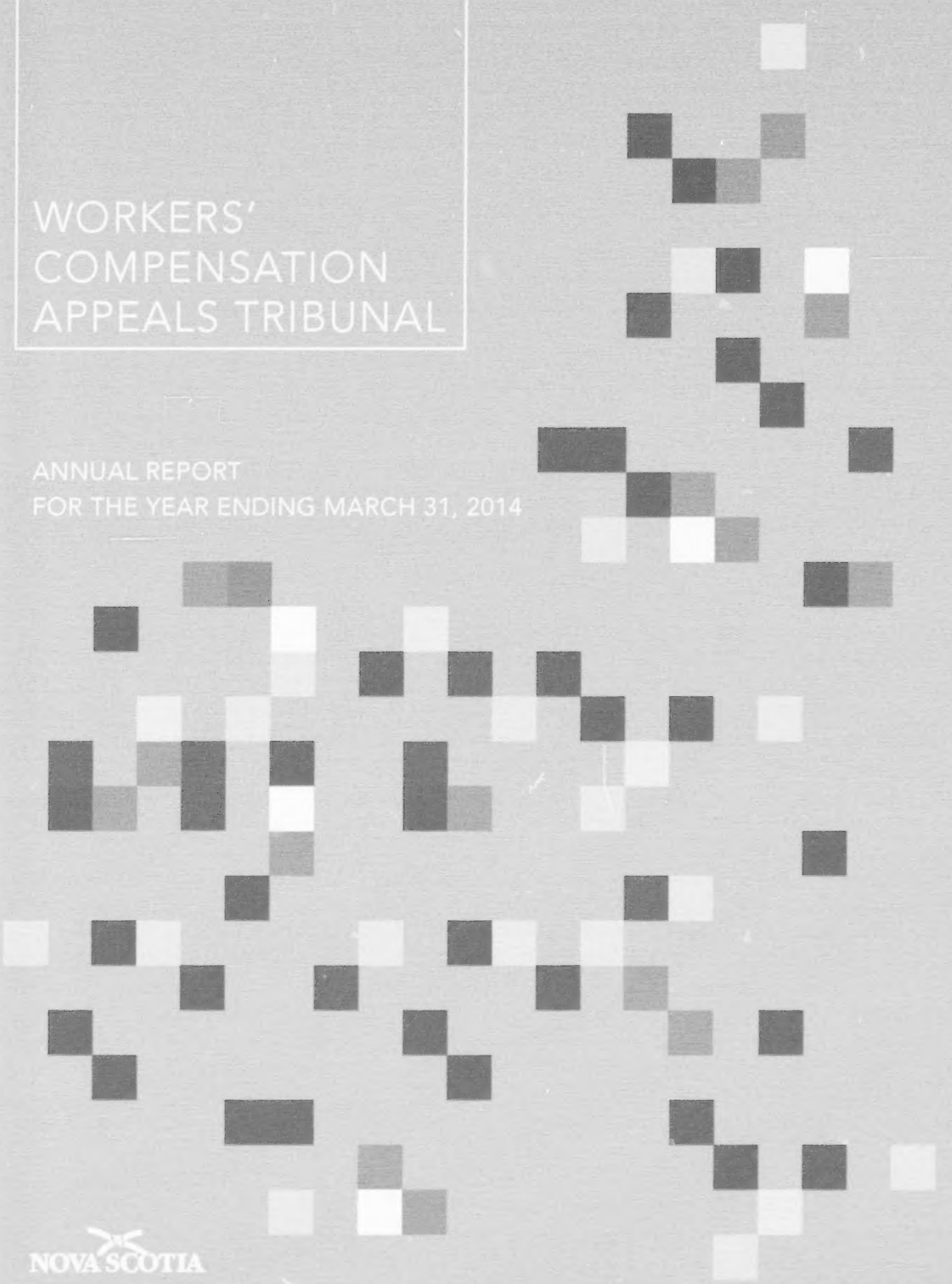
WORKERS' COMPENSATION APPEALS TRIBUNAL

ANNUAL REPORT
FOR THE YEAR ENDING MARCH 31, 2014



NOVA SCOTIA

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ANNUAL REPORT
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Workers' Compensation
Appeals Tribunal

Lena Metlege Diab
Minister of Justice

Dear Honourable Minister:

The Workers' Compensation Appeals Tribunal is pleased to present its Annual Report for the fiscal year ending March 31, 2014.

Respectfully submitted,

Louanne Labelle

Louanne Labelle
Chief Appeal Commissioner

NOVA SCOTIA
Workers' Compensation
Appeals Tribunal

His Honour
Brigadier-General The Honourable J.J. Grant, CMM, ONS, CD (Ret'd)
Lieutenant Governor of Nova Scotia

May It Please Your Honour:

I have the honour to submit the Annual Report of the Workers' Compensation Appeals Tribunal for the fiscal year ending March 31, 2014.

Respectfully submitted,

Lena Metlege Diab
Minister Responsible for Part II of the *Workers' Compensation Act*

TRIBUNAL PERSONNEL

Colleen Bennett
Supervisor, Office Services

Charlene Downey
Secretary / receptionist

Joy Fowler / Debbie Murphy (term)
Secretary

Samantha MacGillivray
Secretary

Diane Smith
Scheduling coordinator

Louanne Labelle
Chief Appeal Commissioner

APPEAL COMMISSIONERS

Leanne Rodwell Hayes
Alison Hickey
Glen Johnson
Gary Levine
Brent Levy
Sandy MacIntosh
Andrew MacNeil
David Pearson
Andrea Smillie

Joseph Fraser
Appeal Commissioner / Registrar

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EXECUTIVE SUMMARY

The Workers' Compensation Appeals Tribunal (the tribunal) hears appeals from final decisions of hearing officers of the Workers' Compensation Board (the board) and determines whether the act bars a right of action against employers. The tribunal is legally and administratively separate from the board and ensures an independent and impartial review of board decisions.

The tribunal also works with several partner agencies within the framework known as the Workplace Safety and Insurance System (WSIS). Partner agencies are the board, the Workers' Advisers Program (WAP), and the Occupational Health and Safety division of the Department of Labour and Advanced Education.

This annual report will highlight the processing and adjudication of appeals as well as the tribunal's participation in joint initiatives with system partners.

OPERATIONS OVERVIEW

The tribunal's appeal volumes remain comparable to last year. The tribunal received 787 appeals in 2013–14, compared to 765 in the previous year. The tribunal was not able to increase decision output during the year as the number of decisions issued by the tribunal decreased from 714 in 2012–2013 to 639 in 2013–14. Therefore, at year-end, 670 appeals remained to be resolved, compared to 605 last year.

Timeliness to decision has not improved. Appeals continue to take longer to resolve primarily due to requests for additional medical evidence by WAP and, on occasion, by employers. Approximately 43 per cent of decisions were released within six months of the date the appeal was received, down from 52 per cent in the previous year.

Approximately 60 per cent of decisions were released within 9 months of the date the appeal was received, compared to 70 per cent last year. Over 30 per cent of appeals took more than 11 months to resolve as compared to 25 per cent the previous year. The tribunal has been increasing its efforts to resolve appeals that have been outstanding for over one year.

The tribunal reports decisions by representation based on the information available at the time decisions are released. In some appeals, WAP may represent workers when the notice of appeal is filed and they may withdraw their representation prior to a hearing. Employers,

as well, decide, on occasion, to discontinue their participation on appeal prior to a hearing.

Of the 639 decisions issued this past year, 61 per cent of workers were represented by WAP. However, of the 670 outstanding appeals at year-end, 75 per cent of workers were represented by WAP.

Employers participated in 28 per cent of the resolved appeals in 2013–14 and are participating in 30 per cent of the appeals outstanding at the tribunal at year-end. Many employers are unrepresented but can benefit from the advice offered by the Office of the Employer Advisor.

The tribunal communicates directly with unrepresented participants – whether workers or employers – to provide them with information on appeal processes.

During the year 2013–14, entitlement to new or increased benefits for permanent impairment was again the issue most often on appeal, representing 24 per cent of issues on appeal. Recognition of claim was also significant at 21 per cent of issues on appeal.

The tribunal heard most appeals (60.5 per cent) by way of oral hearing, an increase from last year's total of 58 per cent.

Outcomes on appeal for the year 2013–14 varied slightly. The overturn rate (appeals allowed or allowed in part) by the tribunal increased to 48.7 per cent from 44.4 per cent the year previous. The number of appeals referred back to the hearing officer decreased slightly to 13 per cent, from 14.7 per cent. The number of appeals denied decreased to 38 per cent, from 40.8 per cent.

The tribunal resolved 82 appeals without the need for a hearing, a decrease from last year's total of 116 which had been achieved through the efforts of a full time registrar. The tribunal resolved a total of 721 appeals this past year as compared to 830 last year.

Appeals continue to be filed predominantly by workers (94 per cent).

Appeals to the Court of Appeal decreased during 2013–14 to 6 (less than 1 per cent of decisions rendered) from 14 the previous year. At year end, 6 appeals remained at the Court of Appeal. Of the decisions issued by the Court this year, 5 appeals were denied at the leave stage, 1 was dismissed by the Court and 1 was allowed and remitted back to the board.

The tribunal continued to issue a consistent and coherent body of decisions, providing clarity and guidance to adjudicators, injured workers and employers.

Following the December 6, 2012 tribunal decision involving a challenge to the stress exclusion in s. 2(a) of the act (*Decision 2011 359 AD*), the board's Board of directors, after a period of stakeholder consultation, adopted board policy 1.3.9 to establish criteria for the individualized adjudication of psychological injury claims under the act. This new policy applies to all decisions made on or after March 25, 2014.

Appeals involving stress claims that were on hold pending the new policy will now proceed even though *Decision 2011 359 AD* remains on appeal at the Court of Appeal. In that decision, a panel of three appeal commissioners found that, although s. 2(a) draws a distinction on the basis of an enumerated ground of discrimination (disability), this distinction does not amount to discrimination because it does not create a disadvantage by perpetuating a prejudice or stereotype.

APPEAL MANAGEMENT

This past year, appeal commissioners assumed the role of tribunal registrar on an interim basis until the appointment of the new full time appeal commissioner/registrar, Joseph Fraser, whose primary role is to ensure efficient case management and to facilitate the early resolution of appeals. Mr. Fraser brings many years of experience as a case manager, program manager and mediator of employment related disputes to the role of appeal commissioner/registrar.

Mr. Fraser joined the tribunal in early January 2014 and has begun regular meetings with representatives from WAP and Internal Appeals in our continued effort to engage our system partners and stakeholders in moving towards a more timely and effective resolution of appeals.

By this collaborative effort, the tribunal is improving the effective management of appeals.

The tribunal continues to monitor and actively support the new process implemented in the board's service delivery units to ensure that additional evidence provided by WAP on appeal is considered by the appropriate case managers prior to a decision being rendered by the tribunal. Results for the current year are encouraging and demonstrate that a timely review of new information may resolve some appeals sooner, without the need for a hearing. It may also avoid the referral back of an appeal for reconsideration based on new information if the board has a mechanism by which to review the information. The process is intended to ensure that case managers have access to current information and that they stay engaged in a claim even if it is on appeal.

Communication by various means remains a focal point of the registrar's role. This includes, as previously reported, keeping participants informed of the appeal status in addition to maintaining compliance with tribunal deadlines. The tribunal continues to work closely with WAP to try to resolve appeals in a more timely manner, above and beyond the monthly docket meetings held with the WAP.

The tribunal has continued the collaborative approach with the Internal Appeals division at the board with respect to the review and release of claim file information to employers. This initiative has met with success in terms of efficiencies and consistency of information disclosed to participants by Internal Appeals and the tribunal.

Internally, the tribunal's case management team involved all staff in a review to update the tribunal's communication tools and processes to respond better to the needs of participants.

INTERAGENCY COOPERATION

As Chief Appeal Commissioner, I am a member of the Heads of Agencies Committee, which oversees implementation of the WSIS strategic plan. I also meet regularly with the Chief Workers' Adviser, the Manager of the board's Internal Appeals department, the Manager of the board's Client Services department and board legal counsel to discuss issues arising from the adjudication of claims and appeals. This group forms the Issues Resolution Working Group (IRWG) whose mandate is to develop and implement issue resolution initiatives to support improved communication, information sharing and overall efficiency of the workers' compensation system.

During 2013–14, IRWG continued to work very closely with the Internal Appeals Review Project team during the implementation phase of the project. The proposed changes to the current Internal Appeals function to achieve a more collaborative approach to resolving appeals has led to increased collaboration between the tribunal and internal appeals to streamline appeal processes particularly when participants have several appeals or issues at the different levels of adjudication.

Partner agencies have continued to monitor implementation of the recommendations and provide ongoing feedback as specific initiatives are implemented.

IRWG and its sub-committee, the Appeal Issues Discussion Group, participated in the development of a new process implemented by the board's service delivery units to ensure that additional evidence provided by WAP on appeal is reviewed by case managers. This initiative may help resolve appeals more effectively.

We also provided feedback to the board respecting training programs being offered to adjudicators around entitlement issues. These initiatives achieve a level of system learning that improves the quality of decisions.

The Appeal Issues Discussion Group also continued to monitor progress on hearing loss claims in an effort to promote consistency throughout the system. The board has begun a consultation process regarding a new policy on hearing loss claims.

INTERACTION WITH STAKEHOLDERS

There were many opportunities for tribunal members to interact with stakeholders this past year, particularly in the context of the consultation process on the Internal Appeals Review Project. Stakeholder consultation sessions were held in April and November, 2013. On December 2, 2013, I participated in a meeting facilitated by the board with representatives of the OEA, the Office of the Worker Counsellor and WAP to discuss ways to improve communication and cooperation between agencies.

I also met with worker and employer representatives on several occasions to discuss matters of concern including privacy issues, disclosure of documents and employer participation in appeals. The tribunal participated in two workshops offered by the Office of the Employer Advisor on the appeal system. We also collaborated on both occasions with the OEA in the planning of a mock hearing for employers who are participating in greater numbers in the appeal system.

On a yearly basis, I meet with the board's Board of Directors to bring them up to date on operations at the tribunal. On May 14, 2013, the Deputy Minister of Labour and Advanced Education and the Chair of the board's Board of Directors hosted the eighth annual meeting of stakeholders. This was an opportunity for partner agencies such as the tribunal to answer questions from stakeholders on tribunal operations.

FINANCIAL OPERATIONS

In 2013–14, the tribunal's total expenditures were within 78 per cent of the original authority and within 92 per cent of our revised forecast. Net expenditures totaled 1,656,290.30, a decrease from the previous year of $105,945.43.

KEY INITIATIVES FOR THE YEAR AHEAD

- The timely and efficient adjudication of appeals. We continue to engage our partners, primarily the Workers' Advisers Program, in developing strategies to improve timeliness. We have made progress in reducing the number of unscheduled appeals and in resolving appeals that were outstanding for more than one year, however, our statistics indicate that year over year, it is taking longer to resolve appeals. This joint effort will be ongoing this year and will be facilitated by a newly created full time position of appeal commissioner/registrar. The tribunal will also involve employer and board representatives in our efforts to improve outcomes for all participants.

Other priorities include:

- Consistent, high quality decision making ensured by performance management and peer review.

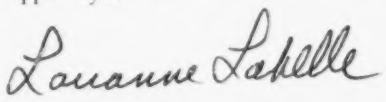
- Simplified and fair appeal processes, ensured by continued efforts by the tribunal to educate, inform and assist self represented appeal participants. The tribunal will continue updating our communication tools in 2014–15 to keep up with changes in appeal processes in an effort to provide our clients with the information they need to access the tribunal. We continue to participate in workshops on the appeal system hosted by stakeholder groups such as the Office of the Employer Advisor.

- Cooperation with partner agencies within the workers' compensation system particularly in the area of developing an issue resolution strategy aiming at a less adversarial system. The focus of our efforts this year will be the implementation of the recommendations of the Internal Appeals Review Project aimed at improving the quality of case management at the board and refocusing the Internal Appeals Department based on a more collaborative approach to resolving appeals. The tribunal's and Internal Appeals' registrars are meeting on a regular basis to improve efficiencies, particularly when participants have several ongoing issues/appeals in the system.

- The continuing review of the tribunal's policies and procedures regarding document management, privacy issues and the disclosure of information.

Again this year, I would like to recognize the individual contributions of all tribunal staff in the efficient and fair resolution of appeals during this past year. Their dedication and commitment ensured that the tribunal maintained not only its efficient operations but also the standard of quality and consistency expected by all participants.

I would also like to recognize the collaborative efforts shown by all stakeholders and partner agencies who participated in the board's Internal Appeals Review Project. This initiative promises to bring significant improvement in outcomes for all participants in the appeal system.



Louanne Labelle
Chief Appeal Commissioner

INTRODUCTION

The Workers' Compensation Appeals Tribunal (the tribunal) hears appeals from final decisions of hearing officers of the Workers' Compensation Board (the board) and determines whether the act bars a right of action against employers. The tribunal is legally and administratively separate from the board and ensures an independent and impartial review of board decisions.

The tribunal also works with several partner agencies within the framework known as the Workplace Safety and Insurance System (WSIS). Partner agencies are the board, the Workers' Advisers Program (WAP) and the Occupational Health and Safety division of the Department of Labour and Advanced Education.

This annual report will highlight the processing and adjudication of appeals as well as the tribunal's participation in joint initiatives with system partners.

RELATIONSHIP TO THE BOARD

The following is a brief outline of the parameters that guide interactions between the tribunal and the board.

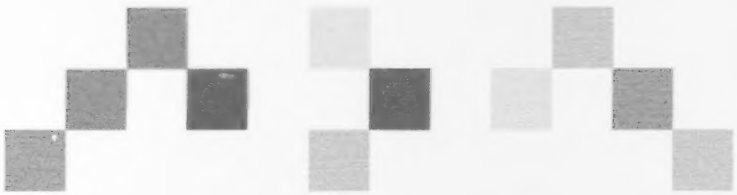
Although the tribunal is an external appeal agency, independent of the board, the tribunal interacts with the board on several different levels.

Board – as funder

The tribunal is funded by the Accident Fund. Practically speaking, expenses are paid out of the Consolidated Revenue Fund of the Province and they are reimbursed from the Accident Fund. The Chief Appeal Commissioner reports to the House of Assembly through the Minister of Justice. This reporting relationship helps to ensure independence, which is the cornerstone of an administrative tribunal.

Board – as appeal participant

The tribunal's mandate is to hear and decide appeals from final decisions of the board. Participants in appeals before the tribunal include injured workers, their representatives (primarily the WAP), employers and board representatives. On occasion, the Attorney General of Nova Scotia and any other interested party may also participate. The board is usually represented by counsel from the board's legal department. On occasion, the board hires outside legal counsel. As a participant in every proceeding, the board's legal department is aware of the status of every appeal currently before the tribunal. The board has the same rights and the same obligations as other participants. All questions of process, evidence or form of hearing are addressed to the presiding appeal commissioner(s) (the appeal commissioner(s) to whom the appeal has been assigned), with full disclosure to all participants.



An appeal commissioner or a panel of three appeal commissioners decides an appeal according to the act, regulations and board policies, documentary evidence previously submitted or collected by the Board, any additional evidence the participants present, the decision under appeal, submissions of the participants and any other evidence that the tribunal may request or obtain (section 246 of the act). Once an appeal is assigned to an appeal commissioner(s), the Chief Appeal Commissioner or others can not intervene to influence the judgment of the commissioner.

In its adjudicative role, the tribunal is guided by the principles of independence, fairness and consistency.

Board – as policy maker

The board's Board of Directors has policy making authority. The Board of Directors may adopt policies to be followed in the application of the act or regulations.

The tribunal's independence is underscored by section 183(5) of the act which states that the tribunal is not bound by board policy where it is inconsistent with the act or the regulations.

Section 248 of the act provides that the Chair of the board's Board of Directors may adjourn or postpone an appeal before the tribunal at any time before a decision is rendered by the tribunal and direct that the appeal be reviewed by the Board of Directors where the Chair is of the opinion that an appeal raises an issue of law and general policy that should be reviewed by the Board of Directors under s. 183 of the act.

All appeals that, in the opinion of the Chair, raise the same issue or issues as an appeal postponed or adjourned pursuant to this section are deemed to be postponed or adjourned for the same period with respect to those issues.

Where the Chair postpones or adjourns a hearing, the Chief Appeal Commissioner shall ensure that the final disposition of the appeal is left solely to the independent judgment of the appeals tribunal.

In addition, the Chief Appeal Commissioner or the presiding appeal commissioner, as the case may be, may make an interim award in an amount and for a period of time as determined by the Chief Appeal Commissioner or the presiding appeal commissioner, as the case may be, while a matter is postponed or adjourned.

The tribunal may also refer a question of law or general policy to the Board of Directors.

Under s. 247 of the act, where the Chief Appeal Commissioner or the presiding appeal commissioner is of the opinion that an appeal raises an issue of law and general policy that should be reviewed by the Board of Directors pursuant to s. 183, the Chief Appeal Commissioner or the presiding appeal commissioner, to whom the appeal has been assigned, shall postpone or adjourn the appeal and refer the appeal to the Chair.

The Chair may direct that any appeal referred to the Chair be reviewed by the Board of Directors pursuant to s. 183, or returned to the tribunal.

Again, all appeals that, in the opinion of the Chief Appeal Commissioner, raise the same issue or issues as an appeal postponed or adjourned pursuant to this section are deemed to be postponed or adjourned for the same period with respect to those issues.

The Chief Appeal Commissioner or the presiding appeal commissioner, as the case may be, may make an interim award in an amount and for a period of time as determined by the Chief Appeal Commissioner or the presiding appeal commissioner, as the case may be, while a matter is postponed or adjourned.

The referral to the Chair of the Board of Directors under s. 247 is within the sole discretion of the Chief Appeal Commissioner or of the presiding appeal commissioner(s) if an appeal has been assigned for decision.

The referral is in writing with full disclosure to all participants and the referral triggers an adjournment.

Board – as partner

The tribunal is a partner in the WSIS and participates in joint committees, such as the Heads of Agencies Committee (HAC) and the Issues Resolution Working Group.

HAC's mandate as outlined in the Memorandum of Understanding signed by partner agencies is to oversee the implementation of a strategic plan for WSIS, recognizing that cooperation and communication between and amongst agencies is crucial for the implementation of the strategic plan.

We are mindful that our participation at any level with partner agencies does not compromise, and must not be perceived to be compromising, the independence of the tribunal.

TRIBUNAL MANDATE AND PERFORMANCE MEASURES

While governed by the same enabling statute as the board, the tribunal is legally and administratively separate from it, and is ordinarily not bound by board decisions or opinions. This ensures a truly independent review of contested outcomes.

In the processing and adjudication of appeals, the tribunal strives to strike a balance between procedural efficiency and fairness. Its work is directed by principles of administrative law, by statute, and by decisions of superior courts.

Its performance is shaped by, and measured against, several parameters drawn from the act, and by its own survey of user groups.

The tribunal's decisions are written. Appeal commissioners strive to release decisions within 30 days of an oral hearing or the closing of deadlines for written submissions, although the act requires that decisions be released within 60 days of a hearing.

New appeals are processed within 15 days of receipt by the tribunal.

Optimally, the tribunal can hear an appeal within 45 days of receiving notice that the participants are ready to proceed. Most appeals take longer to schedule because, increasingly, there is more than one party involved or more (specialist) medical evidence is sought. As demand for representation by WAP rises, it necessarily takes longer for WAP to meet with a potential client, and more time for WAP to evaluate a potential client's claim.

OPERATIONS

The tribunal's appeal volumes remain comparable to last year. The tribunal received 787 appeals in 2013–14, compared to 765 in the previous year (see Figure 1). The tribunal was not able to increase decision output during the year as the number of decisions issued by the tribunal decreased from 714 in 2012–2013 to 639 in 2013–14 (see Figure 2). Therefore, at year-end, 670 appeals remained to be resolved, compared to 605 last year (see Figure 3).

Please see Appendix (pages 33–36) containing specific data for the following figures.

FIGURE 1
APPEALS RECEIVED

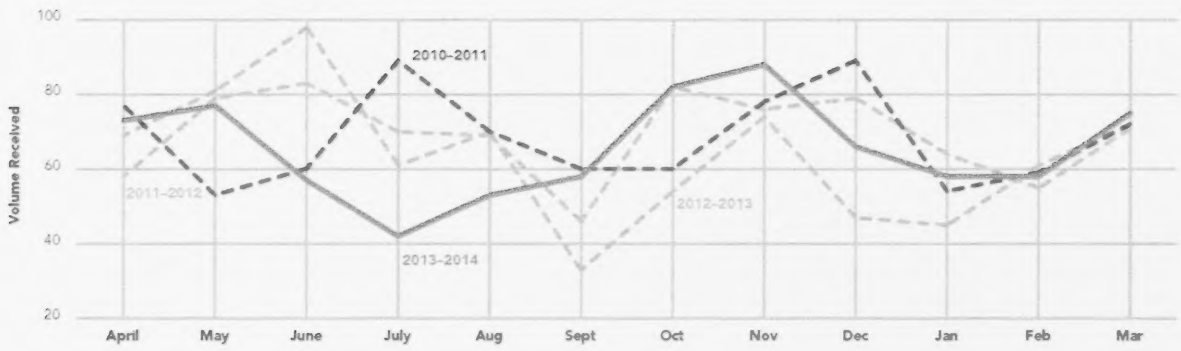


FIGURE 2
DECISIONS RENDERED

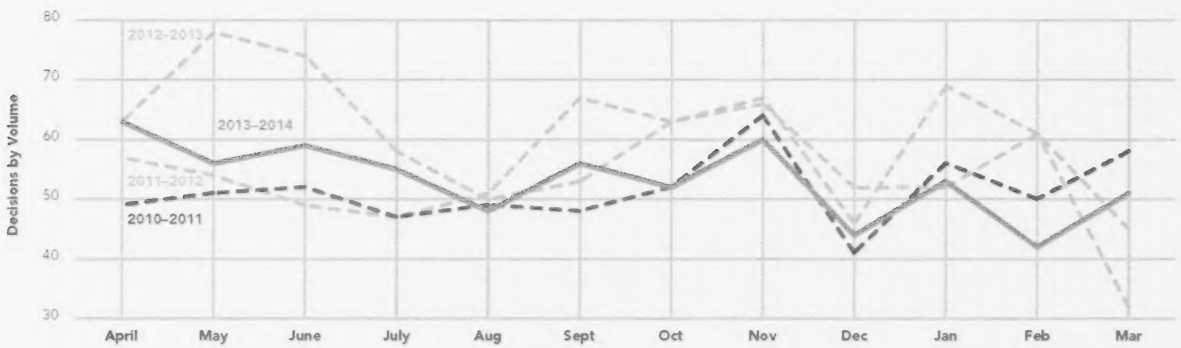
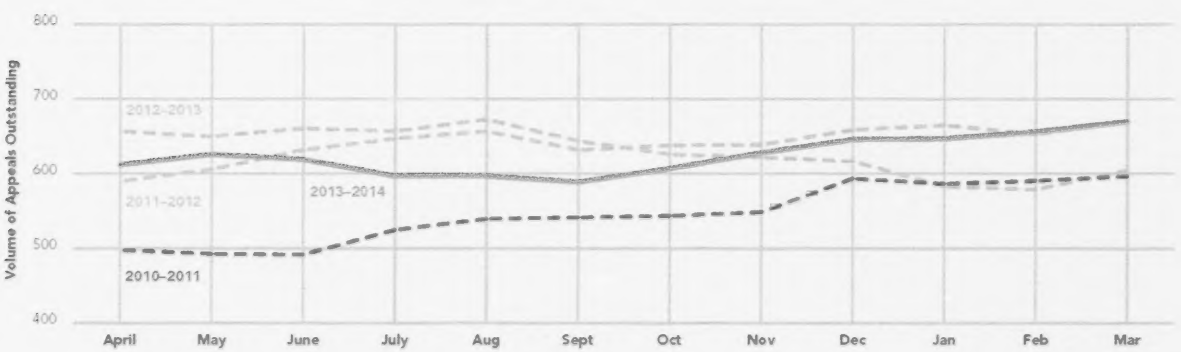


FIGURE 3
APPEALS OUTSTANDING AT YEAR END



Timeliness to decision release has not improved. Appeals continue to take longer to resolve primarily due to requests for additional medical evidence by WAP and, on occasion, by employers. Approximately 43 per cent of decisions were released within six months of the date the appeal was received, down from 52 per cent in the previous year (see Figure 4). Approximately 60 per cent of decisions were released within 9 months of the date the appeal was received, compared to 70 per cent last year. Over 30 per cent of appeals took more than 11 months to resolve as compared to 25 per cent the previous year. The tribunal has been increasing its efforts to resolve appeals that have been outstanding for over one year.

The tribunal reports decisions by representation based on the information available at the time decisions are released. In some appeals, WAP may represent workers when the notice of appeal is filed and they may withdraw their representation prior to a hearing. Employers, as well, decide, on occasion, to discontinue their participation in an appeal prior to a hearing.

Of the 639 decisions issued this past year, 61 per cent of workers were represented by WAP (see Figure 5). However, of the 670 outstanding appeals at year end, 75 per cent of workers were represented by WAP.

FIGURE 4
TIMELINESS TO DECISION

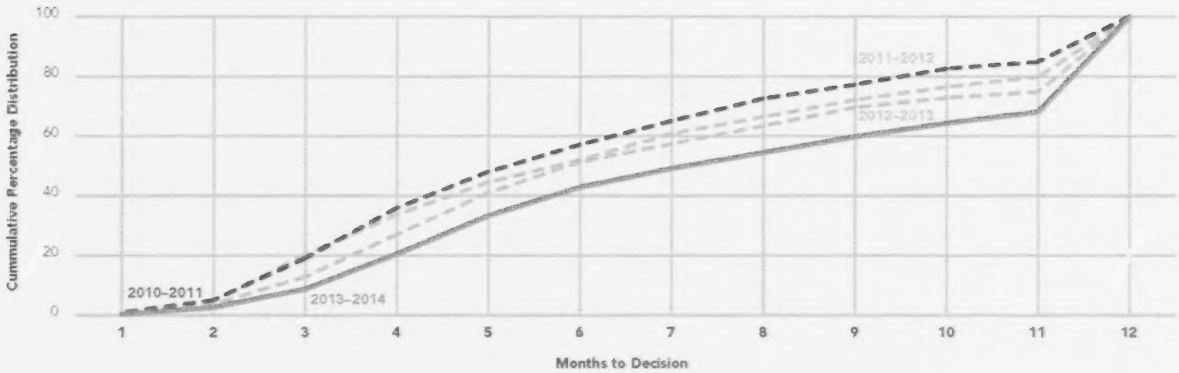


FIGURE 5
DECISIONS BY REPRESENTATION

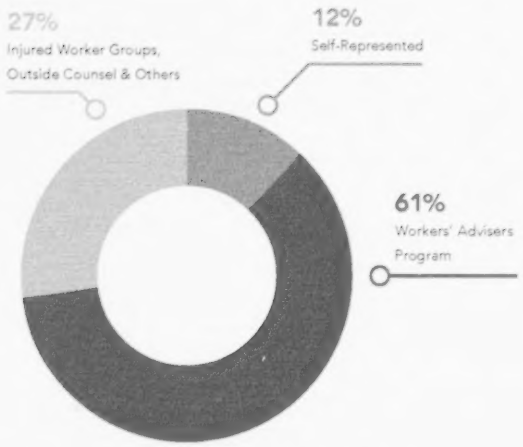


FIGURE 6
DECISIONS BY ISSUE CATEGORIES – WORKER

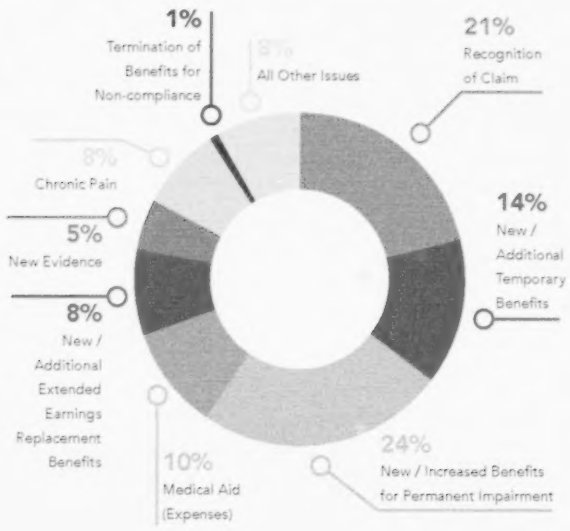
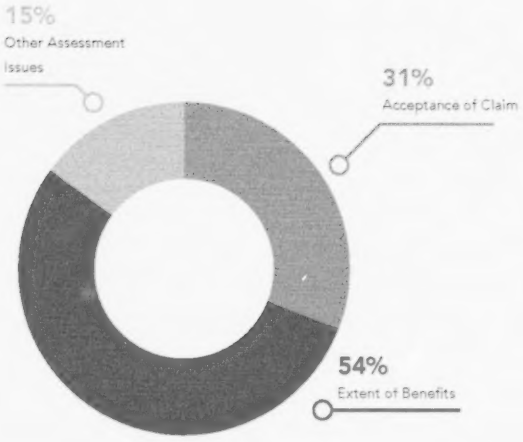


FIGURE 7
DECISIONS BY ISSUE CATEGORIES – EMPLOYER



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The tribunal communicates directly with unrepresented participants – whether workers or employers – to provide them with information on appeal processes.

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The tribunal heard most appeals (60.5 per cent) by way of oral hearing, an increase from last year's total of 58 per cent (see Figure 8).

Outcomes on appeal for the year 2013–14 varied slightly. The overturn rate (appeals allowed or allowed in part) by the tribunal increased to 48.7 per cent from 44.4 per cent the year previous (see Figure 9). The number of appeals referred back to the hearing officer decreased slightly to 13 per cent, from 14.7 per cent. The number of appeals denied decreased to 38 per cent, from 40.8 per cent.

The tribunal resolved 82 appeals without the need for a hearing, a decrease from last year's total of 116 which had been achieved through the efforts of a full-time registrar. The tribunal resolved a total of 721 appeals this past year as compared to 830 last year.

Appeals continue to be filed predominantly by workers (94 per cent) (see Figure 10).

Appeals to the Court of Appeal decreased during 2013–14 to 6 (less than 1 per cent of decisions rendered) from 14 the previous year (see Figure 11). At year end, 6 appeals remained at the Court of Appeal. Of the decisions issued by the Court this year, 5 appeals were denied at the leave stage, 1 was dismissed by the Court and 1 was allowed and remitted back to the board.

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Following the December 6, 2012 tribunal decision involving a challenge to the stress exclusion in s. 2(a) of the act (*Decision 2011-359-AD*), the board's Board of directors, after a period of stakeholder consultation, adopted board policy 1.3.9 to establish criteria for the individualized adjudication of psychological injury claims under the act. This new policy applies to all decisions made on or after March 25, 2014.

FIGURE 8
DECISIONS BY MODE OF HEARING

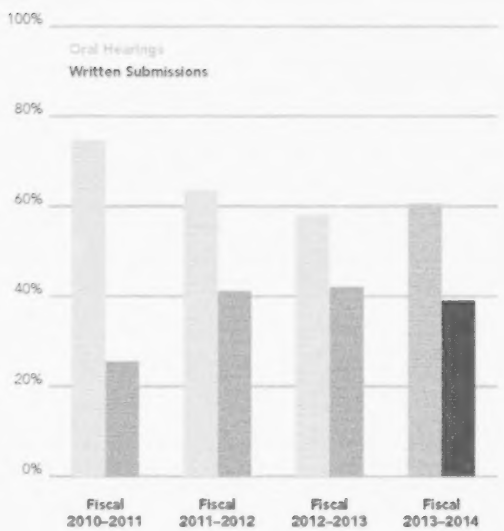


FIGURE 9
DECISIONS BY OUTCOME

FIGURE 10
DECISIONS BY APPELLANT TYPE

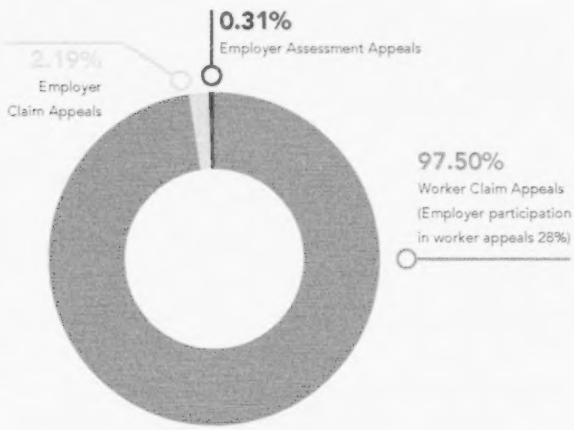
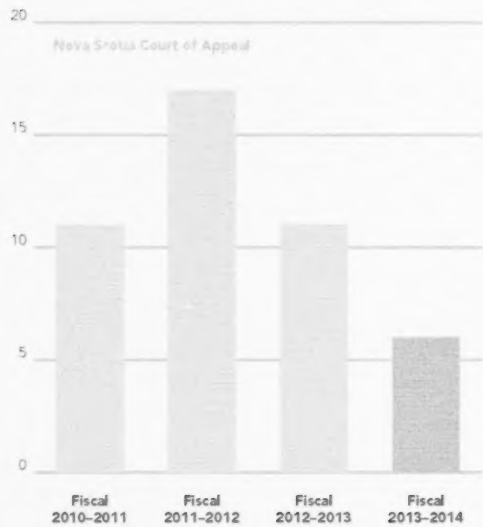


FIGURE 11
APPEALS BEFORE THE COURTS AT YEAR END



Appeals involving stress claims that were on hold pending the new policy will now proceed even though *Decision 2011-359-AD* remains on appeal at the Court of Appeal. In that decision, a panel of three appeal commissioners found that, although s. 2(a) draws a distinction on the basis of an enumerated ground of discrimination (disability), this distinction does not amount to discrimination because it does not create a disadvantage by perpetuating a prejudice or stereotype.

APPEAL MANAGEMENT

This past year, several appeal commissioners assumed the role of tribunal registrar until the appointment of the new full-time appeal commissioner/registrar, Joseph Fraser, whose primary role is to ensure efficient case management and to facilitate the early resolution of appeals. Mr. Fraser joined the tribunal in early January 2014 and has begun regular meetings with representatives from WAP and Internal Appeals in our continued effort to engage our system partners and stakeholders in moving towards a more timely and effective resolution of appeals.

By this collaborative effort, the tribunal is improving the effective management of appeals.

Mr. Fraser brings many years of experience as a case manager, program manager and mediator of employment-related disputes to the role of appeal commissioner/registrar.

The tribunal continues to monitor and actively support the new process implemented in the board's service delivery units to ensure that additional evidence provided by WAP on appeal is considered by the appropriate case managers prior to a decision being rendered by the tribunal. Results for the current year are encouraging and demonstrate that a timely review of new information may resolve some appeals sooner, without the need for a hearing. It may also avoid the referral back of an appeal for reconsideration based on new information if the board has a mechanism by which to review the information. The process is intended to ensure that case managers have access to current information and that they stay engaged in a claim even if it is on appeal.

Communication by various means remains a focal point of the registrar's role. This includes, as previously reported, keeping participants informed of the appeal status in addition to maintaining compliance with tribunal deadlines. The tribunal continues to work closely with WAP to try to resolve appeals in a more timely manner, above and beyond the monthly docket meetings held with the WAP.

The tribunal has continued the collaborative approach with the Internal Appeals division at the board with respect to the review and release of claim file information to employers. This initiative has met with success in terms of efficiencies and consistency of information disclosed to participants by Internal Appeals and the tribunal.

Internally, the tribunal's case management team involved all staff in a review to update the tribunal's communication tools and processes to respond better to the needs of participants.

INTERAGENCY COOPERATION

The Chief Appeal Commissioner is a member of the Heads of Agencies Committee, which oversees implementation of the WSIS strategic plan. She meets regularly with the Chief Workers' Adviser, the Manager of the board's Internal Appeals department, the Manager of the board's Client Services department and board legal counsel to discuss issues arising from the adjudication of claims and appeals. This group forms the Issues Resolution Working Group (IRWG) whose mandate is to develop and implement issue resolution initiatives to support improved communication, information sharing and overall efficiency of the workers' compensation system.

During 2013–14, IRWG continued to work very closely with the Internal Appeals Review Project team during the implementation phase of the project. The proposed changes to the current Internal Appeals function to achieve a more collaborative approach to resolving appeals has led to increased collaboration between the tribunal and internal appeals to streamline appeal processes particularly when participants have several appeals or issues at the different levels of adjudication.

Partner agencies have continued to monitor implementation of the recommendations and provide ongoing feedback as specific initiatives are implemented.

IRWG and its sub-committee, the Appeal Issues Discussion Group, participated in the development of a new process implemented by the board's service delivery units to ensure that additional evidence provided by WAP on appeal is reviewed by case managers. This initiative may help resolve appeals more effectively.

IRWG also provided feedback to the board respecting training programs being offered to adjudicators in respect of entitlement issues. These initiatives achieve a level of system learning that improves the quality of decisions.

The Appeal Issues Discussion Group also continued to monitor progress on hearing loss claims in an effort to promote consistency throughout the system. The board has begun a consultation process regarding a new policy on hearing loss claims.

INTERACTION WITH STAKEHOLDERS

There were many opportunities for tribunal members to interact with stakeholders this past year, particularly in the context of the consultation process on the Internal Appeals Review Project. Stakeholder consultation sessions were held in April and November, 2013. On December 2, 2013, the Chief Appeal Commissioner participated in a meeting facilitated by the board with representatives of the OEA, the Office of the Worker Counsellor and WAP to discuss ways to improve communication and cooperation between agencies.

The Chief Appeal Commissioner also met with worker and employer representatives on several occasions to discuss matters of concern including privacy issues, disclosure of documents and employer participation in appeals. The tribunal participated in two workshops offered by the Office of the Employer Advisor on the appeal system. We also collaborated on both occasions with the OEA in the planning of a mock hearing for employers who are participating in greater numbers in the appeal system.

On a yearly basis, the Chief Appeal Commissioner meets with the board's Board of Directors to bring them up to date on operations at the tribunal. On May 14, 2013, the Deputy Minister of Labour and Advanced Education and the Chair of the board's Board of Directors hosted the eighth annual meeting of stakeholders. This was an opportunity for partner agencies such as the tribunal to answer questions from stakeholders on tribunal operations.

FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY

Tribunal decisions contain personal and business information, particularly medical information. Hearings are held in camera. The decisions are provided to appeal participants including the worker, the board, and the employer. The decisions from January 2010 to date are published on the *Canadian Legal Information Institute*'s free public website at www.canlii.org. Decisions issued prior to January 2010 are available free to the public through the Department of Labour and Advanced Education website at www.novascotia.ca/lae/databases.

The tribunal is governed by Part II of the act. The legislation does not specifically permit the publication of decisions. However, the tribunal has adopted a practice manual, available online, which sets out the tribunal's procedures and rules for the making and hearing of appeals as authorized under s. 240 of the act.

The tribunal's practice manual advises of the publication of tribunal decisions and provides as follows:

14.00 PUBLICATION OF TRIBUNAL DECISIONS

14.10 General

Tribunal decisions include a cover page setting out the names of participants and representatives. This information is not found in the body of the decision. The Tribunal endeavours to exclude any information from the body of a decision which could identify the participants.

Decisions made prior to January 1, 2010, without identifying features, are available free through the Nova Scotia Department of Labour and Advanced Education website at www.novascotia.ca/lae/databases.

Decisions made after January 1, 2010, without identifying features, are available on the Canadian Legal Information Institute's free website: www.canlii.org.

14.20 Personal Identifiers in Decisions

Generally, decisions are written without personal identifiers for participants, except on the cover page. The names of participants, lay witnesses and others (where the use of names would tend to identify the participants), are not used in Tribunal decisions. Witnesses may be identified by their role, for example, the "worker" or the "employer", or by initials.

Expert witnesses may be referred to by name. However, if an appeal commissioner considers that the use of an expert's name might identify the participant, the expert witness may be referred to by title, for example, the worker's attending physician, or by initials.

The names of representatives will generally not be used in the body of a decision. Instead, they may be referred to by their role, such as the worker's representative. Board claim file numbers or employer registration numbers are not included in the body of a decision.

Quotations contained within Tribunal decisions are edited to protect privacy. This will normally be accomplished by substituting a descriptive term for a name, and using square brackets to show the change, e.g., [the Worker].

A footnote at the bottom of the first page of every decision indicates that the participants have not been referred to by name in the body of the decision as the decision may be published. The publication versions of the decisions on public databases do not include any of the names of the participants nor claim numbers (which appear on the cover page of a decision).

Further vetting occurs after the decision has been released and prior to publication if circumstances warrant. Requests have also been made to withhold decisions from publication due to the extremely sensitive material contained in some of the decisions. These requests are considered and decisions may be withheld from publication.

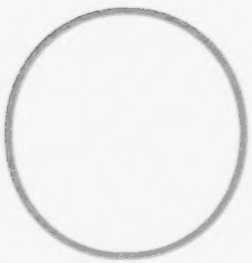
The tribunal has adopted a "decision quality guide" which outlines quality standards for decision making. It includes a section concerning privacy issues, stating that "decisions should be written in a manner that minimizes the release of personal information." Ultimately, a decision maker must have the discretion to include in a decision reference to evidence that the decision maker finds relevant to support the findings outlined in the decision.

Worker claim files are released to employers after vetting by the tribunal for relevance. The tribunal's file release policy ensures compliance with Freedom of Information and Protection of Privacy (FOIPOP) without compromising the need of participants to know the evidence on appeal. Of particular concern to the tribunal is the need to ensure that personal worker information is not used for an improper purpose or improperly released or made public by a third party. The tribunal's correspondence accompanying file copies has also been revised to reflect these requirements and to refer to appropriate sanctions.

The tribunal rarely receives FOIPOP applications. Applications regarding claim files are referred to the board as they remain the property of, and are held by, the board, unless there is an active appeal. If there is an active appeal, no FOIPOP application need be made by an appeal participant, as the act provides for distribution of relevant claim files to appeal participants.

Most FOIPOP applications for generic information particular to the tribunal are addressed through the tribunal's Routine Access Policy, which is posted on the tribunal's website.

NOTEWORTHY DECISIONS FOR THE YEAR 2013–14



Of the 639 decisions issued by the tribunal during fiscal year 2013–14, a number were selected for their general interest to stakeholders because they articulate or confirm an approach to an issue. Alternatively, they may highlight an issue not often considered. These noteworthy decisions are categorized by topic areas.

ASSESSMENT

The most significant decisions in the assessment area concern an industry safety association. The association carried out a safety program on behalf of the board. In turn, the board assessed the association's member firms to fund the program. An agreement governed how monies the board paid the association would be spent.

In *Decision 2010-413 PAD & 2010-669 PAD* (August 27, 2013, NSWCAT), a tribunal panel found that: (1) assessments against member firms were authorized by s. 162 of the act; and (2) levied amounts did not have to be based upon assessed payrolls. In addition, even though an agreement regulated conduct between the board and the association, compliance with the agreement did not affect the board's authority to levy assessments.

The panel's final decision, *2010-413 AD & 2010-669 AD* (December 9, 2013, NSWCAT), considered a challenge brought under the *Canadian Charter of Rights and Freedoms* (the *Charter*) by member firms of the association. The firms' Notice of Constitutional Question failed to comply with the *Constitutional Questions Act* for lack of information (referred to as "particulars"). It was unclear to the panel whether the firms challenged assessments on the basis of freedom of association or s. 15 of the *Charter*. Subsequent submissions also failed to provide sufficient information. Despite the panel's attempts to point out deficiencies and provide extensions of time to comply, particulars were not forthcoming. Ultimately, the panel dismissed the appeals for lack of a valid *Charter* challenge.

CHRONIC PAIN

Two decisions highlight important principles concerning chronic pain awards. The first, *Decision 2012-293 AD* (July 5, 2013, NSWCAT), considered five factors to be analyzed when assessing the impact of a worker's chronic pain in order to award a pain related impairment (PRI). The board utilizes a modified approach to the method prescribed in chapter 18 of the *American Medical Association's Guides to the Evaluation of Permanent Impairment, 5th edition*. An appeal commissioner observed that weighing the relative impact of chronic pain is not

a matter of simple arithmetic (e.g., finding at least three out of the five factors present). Rather, one must look at the impact of chronic pain and make a determination based upon the overall picture.

The second, *Decision 2012 214 AD* (October 21, 2013, NSWCAT), concerned a worker with pre-existing and non-compensable depression who was found to have chronic pain. The board's assessment indicated that if no reduction were made for non-compensable factors, the worker would be entitled to a 6 per cent PRI rating. However, the board apportioned the rating in light of the pre-existing depression. In her decision, an appeal commissioner distinguished chronic pain, a multi-factorial condition, from depression. While depression may be a causal factor leading to chronic pain, it is not known why some individuals go on to develop chronic pain after an injury and some do not. Under the circumstances, the appeal commissioner found that it was inappropriate to reduce the worker's PRI based upon a single possible cause for chronic pain.

EXTENDED EARNINGS-REPLACEMENT BENEFITS (EERB)

Decision 2013 377 AD (February 27, 2014, NSWCAT), involved a 36-month EERB review. The board held that the only way to alter a previously awarded EERB under the act was through a s. 73 review and adjustment. On appeal, a tribunal panel used principles of statutory interpretation to construe s. 73 and s. 185(2) (reconsideration of a decision). By its terms, s. 185(2) is subject to ss. 71–73. However, the panel found that the words "subject to" do not extinguish the ability of the board to reconsider a final EERB decision. According to the panel, ss. 71–73 set out mechanisms which require the board to review and adjust benefits under specified circumstances; whereas s. 185(2) gives the board a general discretionary power to reconsider a final EERB decision without specific triggering events. Therefore, the panel directed the board to determine whether new evidence existed. If so, the board was to reconsider the worker's initial EERB decision.

The panel also considered the words, "review and adjust", which appear in ss. 71–73. Although identical words were used in all three sections, the panel concluded that the method used to set an effective date for a respective benefit varied by virtue of the nature of a particular benefit and additional requirements in a section.

Another 36-month EERB review was considered in *Decision 2013 443 AD* (December 19, 2013, NSWCAT). An appeal commissioner distinguished a 36-month review from the more narrow analysis inherent in a "new evidence" reconsideration under policy 8.1.7R2. The decision did not break new ground, but it confirmed the broad nature of a 36-month review. In this case, possible errors had been identified in the board's underlying assumptions when it initially determined the worker's EERB. The appeal commissioner held that there was a sufficient basis shown to require the board to conduct a proper adjudicative analysis of the worker's EERB apportionment as part of the 36-month review. The board was directed to procure additional medical records and then, in light of the worker's broader claim history, consider the compensability of medical conditions previously thought to be non-compensable.

HEARING LOSS & TINNITUS

Occupational hearing problems, particularly occupational noise-induced hearing loss (ONIHL), was an evolving and active topic area again this year. The five appeal decisions described below highlight a number of different issues considered.

Decision 2013/73-AD (February 21, 2014, NSWCAT) concerned the board's denial of a worker's hearing loss claim where a component of loss was due to presbycusis (hearing loss due to aging). The most interesting aspect of the appeal involved an argument under s. 186 of the act. The section states that decisions must be based on "the real merits and justice of the case and in accordance with this act, the regulations and policies of the Board."

The worker submitted that paragraph 5 of policy 1.2.5AR was inconsistent with s. 186. In essence, the policy sets out a form of apportionment for non compensable presbycusis. It requires that a worker's measured hearing threshold be reduced by 2 decibels (dB) for every year the worker's age exceeds 60.

The worker argued that the reduction for presbycusis does not accord with current scientific understanding. Nonetheless, an appeal commissioner declined to find the policy inconsistent with s. 186 of the act because the statutory provision directs the board to apply the real merits and justice standard in connection with board policy. In other words, the real merits and justice standard is linked to board policy and cannot be applied separate and apart from board policy.

Decision 2012/760-AD & 2013/578-AD (January 7, 2014, NSWCAT), involved a worker with hearing loss in both ears (binaural). The loss resulted from two distinct problems. His right ear drum had been ruptured and his left ear loss was due to ONIHL. The board awarded him two PMI ratings, one for each ear, in separate decisions. The PMIs were each rated under the AMA guides (4th edition) for monaural (one ear) loss. However, an appeal commissioner found that instead of using a monaural rating schedule, the board should have used a binaural hearing loss rating schedule. This is because hearing loss in both ears has a greater impact upon a worker and should result in a greater cumulative PMI rating.

The reliability of screening audiograms was again considered in *Decision 2013/509 & 2014/19-AD* (March 24, 2014, NSWCAT). Screening audiograms are hearing tests which are considered to be of lesser quality than diagnostic audiograms. Diagnostic audiograms are only done by qualified audiologists using calibrated equipment in appropriate testing environments.

In the case under consideration, the worker retired in 1991 and a diagnostic audiogram was done 22 years after his retirement. The board relied upon a number of screening audiograms done between 1981 to 1989 to evaluate his hearing loss. In considering the reliability of the screening audiograms, an appeal commissioner reviewed a number of previous tribunal decisions which had considered their use. The appeal commissioner agreed that screening audiograms may be given some weight when they are consistent with a more reliable test and/or when reliability issues had been satisfactorily addressed. However, under the circumstances the appeal commissioner found there was insufficient evidence concerning the screening audiograms to find them sufficiently reliable. Therefore, the board was directed to use the 2013 audiogram, with an adjustment for presbycusis, to determine the worker's hearing loss.

Another hearing loss issue, asymmetry, was considered in *Decision 2014/45-AD* (March 18, 2014, NSWCAT). Audiogram testing indicated a worker's left ear had a 35 dB greater hearing loss at 2000 Hz than his right ear. The board accepted that he had ONIHL affecting both ears, but found there was an insufficient

compensable basis to explain all of the left sided loss.

Evidence from one expert indicated that some deviation between ears is normal and it is unclear how much variation must exist before it is considered asymmetrical. Even if asymmetry is present, the expert acknowledged it would be difficult to say how much was due to occupational noise versus other factors. A second expert was of the opinion that a difference greater than 10 or 15 dB should be considered asymmetrical.

The board found that the worker had asymmetrical hearing loss. To adjust for the asymmetry, the board substituted his right ear audiogram results for his left ear results in calculating his PMI rating.

On appeal, an appeal commissioner viewed the board's substitution of audiogram readings as a method of apportioning compensable and non-compensable hearing loss. The appeal commissioner found that the substitution was inconsistent with the board's apportionment policy, 3.9.11R1. This was because there had not been a determination of actual left-sided loss attributable to non-compensable factors, nor had there been an attempt to define such loss according to the board's policy. Instead, it was merely assumed that the loss was exactly the same for both ears. The assumption failed to give the worker the benefit of the doubt and was inconsistent with the opinion evidence mentioned above. Therefore, the appeal commissioner directed that the worker's bilateral hearing loss should be redetermined using actual audiogram results, subject to apportionment per board policy.

Turning to another type of hearing disorder, *Decision 2012 754 AD* (April 16, 2013, NSWCAT) dealt with the severity of a worker's tinnitus (the subjective experience of ringing or other noise in the ear). The worker claimed he was entitled to a greater PMI rating for tinnitus than was awarded by the board. Such PMI ratings are to be determined according to board guidelines. The applicable guidelines were the AMA guides (4th edition) which allow for a PMI rating up to 5 per cent for tinnitus.

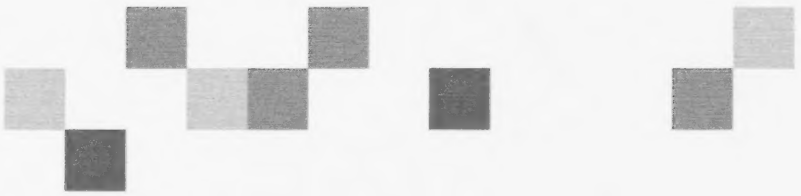
An appeal commissioner accepted an estimated PMI rating from an audiologist. The audiologist arrived at the recommended rating by utilizing a tinnitus handicap inventory and a five point rating scale used by Veterans Affairs Canada. The appeal commissioner accepted that use of the scale to quantify the degree of impact of tinnitus was consistent with the AMA guides and appropriate to capture necessary information to determine a PMI rating.

MEDICAL AID/ATTENDANT ALLOWANCE

Issues pertaining to medical marijuana and synthetic cannibinoids, such as Cesamet, seemed to dominate noteworthy appeals in the medical aid topic area this year. Three such appeals are described below.

In *Decision 2012 608 AD* (July 31, 2013, NSWCAT), the issue was whether policy 2.3.1R permitted reimbursement for the cost of lawfully obtained herbal (smoked) marijuana for pain relief associated with cervical spine (neck) injuries. In order to be eligible for reimbursement as medical aid assistance, the policy requires that services or treatment be consistent with standards of healthcare practices in Canada. Although there is a growing body of evidence to the contrary, an appeal commissioner found that the policy criteria had not been satisfied. He noted that there was a lack of quality studies into the long term health risks associated with marijuana for the type of pain relief requested.

Similarly, in *Decision 2011 655 AD* (September 17, 2013, NSWCAT), an appeal commissioner reviewed a number of studies and decisions from various jurisdictions. Considerable weight was given to a



statement made by a worker's treating specialist. The specialist noted that there was no consensus for the use of marijuana in treating chronic pain and no literature supporting the use of marijuana for workplace injuries. Much of the other evidence presented was considered anecdotal, inconclusive or entitled to little weight. Also, several decisions from different appellate bodies and tribunals, while supporting cost relief for marijuana, did not address standards of healthcare practices in Canada. Based upon the evidence, the appeal commissioner found that the policy criteria had not been met.

On the other hand, *Decision 2013-339-AD* (November 28, 2013, NSWCAT) involved a tribunal determination in favour of medical aid assistance for Cesamet. The board had denied the requested assistance based upon its position paper which cited Cesamet's limited approved uses and lack of efficacy in other applications. However, evidence from the worker's treating physician was that Cesamet had been prescribed only after many unsuccessful trials of other classes of drugs. An appeal commissioner noted that Cesamet was approved for some pain-control uses in Canada (such as occupational cancers) and the worker had a two year history of positive results from the drug. It was considered safe, appropriate and there was no proposed alternative. Therefore, the appeal was allowed.

RECONSIDERATION & NEW EVIDENCE POLICY (8.1.7R2)

The most unsettled topic area among noteworthy decisions this year was the reconsideration of final decisions under the board's new evidence policy, 8.1.7R2. Tribunal decisions were issued in the wake of Nova Scotia Court of Appeal decisions: *Drake v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2012 NSCA 6; and *Enterprise Cape Breton Corporation (Cape Breton Development Corporation) v. Southwell*, 2012 NSCA 23.

In *Decision 2013-355-AD & 2013-505-AD* (February 25, 2014, NSWCAT), an appeal commissioner acknowledged the existence of conflicting tribunal decisions. The point of disagreement was whether additional evidence, particularly "derivative evidence", may be included in making a new evidence finding and/or reconsidering a prior decision pursuant to policy 8.1.7R2. Derivative evidence was said to describe evidence not on file at the time of a final decision, but which may tend to prove or disprove the case to be made with the new evidence. Taking a hypothetical example, if it were found that a CT scan report was new evidence, then derivative evidence might include an orthopaedic surgeon's opinion concerning the significance of the CT scan findings.

The appeal commissioner accepted that derivative evidence could be taken into account along with evidence already found to be "new evidence." It did not make sense to the appeal commissioner that, in enacting policy 8.1.7R2, the board intended to preclude investigating or considering new evidence in its "full context" before it was assessed. Since the additional evidence in question was found to be derivative evidence, the appeal commissioner found it could be included as part of a reconsideration.

On the other hand, the appeal commissioner in *Decision 2012-527-AD & 2013-177-AD* (January 15, 2014, NSWCAT), took a more restrictive view. She noted the Court in *Southwell* said that one piece of new evidence did not open the door to a consideration of all other evidence. An essential part of the test is the requirement that evidence must be capable of having an impact upon a final decision. In the appeal commissioner's view, there was no point including evidence which had not

passed the new evidence test. Therefore, the appeal commissioner excluded additional evidence filed by the worker from consideration.

Both of the foregoing decisions differed from the approach taken in *Decision 2012-637-AD* (July 25, 2013, NSWCAT). The appeal commissioner in this decision was of the opinion that: (1) acceptance of new or additional evidence tendered by participants on appeal was consistent with s. 246(1)(b) of the act; and (2) the factual circumstances and issue before the Court in *Southwell* did not involve evidence newly filed on appeal to the tribunal. Therefore, the appeal commissioner concluded that it was appropriate to include a medical report submitted to the tribunal as part of the new evidence/reconsideration determination.

A still different approach concerning additional evidence submitted following a new evidence finding by the board was taken in *Decision 2012-570-AD & 2012-682-AD* (August 30, 2013, NSWCAT). The appeal commissioner in that case reviewed different positions taken by the tribunal to date. He concluded that it was acceptable to consider additional evidence tendered, but only after reviewing it to see that it met the criteria for new evidence pursuant to policy 8.1.7R2.

PERMANENT IMPAIRMENT

Permanent impairments include permanent medical impairments (PMIs) and pain-related impairments (PRIs). Once it is found that a worker has a permanent impairment, the board must rate its severity. Such ratings are then used to calculate a permanent impairment benefit (PIB) payable to a worker.

Decision 2013-38-AD (June 24, 2013, NSWCAT) concerned a worker who was awarded a 6 per cent PRI for chronic pain and a 14 per cent PMI for a 2008 ankle injury (determined by applying the AMA guides). The worker argued that her PIB should be based upon an overall permanent impairment rating of 20 per cent, but the Board applied a Combined Values Chart contained in the AMA guides. The board's method resulted in a 19 per cent overall permanent impairment rating.

An appeal commissioner noted that policy 3.3.5R directed the use of a Pain-Related Impairment Assessment Tool in assessing the worker's PRI. Appendix A to the policy provides a formula whereby a PMI (assessed under the AMA guides) is to be combined with a PRI to obtain a total impairment rating. Appendix A states that ratings are to be combined by applying the Combined Values Chart. Since this was the method used by the board, the appeal commissioner found that the worker's PIB had been properly calculated using an overall 19 per cent permanent impairment rating.

RECOGNITION

The threshold inquiry in compensation cases is whether an injury or disease may be "recognized" as work related and compensable under the act.

Decision 2012-567-AD (February 28, 2014, NSWCAT) highlights a critical consideration when weighing evidence in recognition cases. The worker had pre-existing bronchial asthma. She claimed that workplace renovations exposed her to substances which aggravated or exacerbated her asthma. However, an appeal commissioner considered evidence of possible exposures to be vague and lacking specificity. There was also evidence that increased symptoms predated the renovations. The appeal commissioner concluded that, while it was possible the worker could have been exposed to fumes from paint, glue and/or construction

dust during three shifts at work, there was insufficient evidence to infer such exposures actually occurred. Furthermore, evidence from medical experts was described as "equivocal." The appeal commissioner found that the evidence did not meet the "as likely as not" standard required by the act in order to recognize the worker's claim.

The noteworthy aspect of the decision was the appeal commissioner's reference to analogous circumstances in *Veinot v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2014 NSCA 112. In that case, a physician was asked whether it was "likely" or "possible" a workplace injury contributed to a subsequent medical condition. The physician responded that it was "possible" rather than "likely."

Decision 2013-242-AD-RTH (August 20, 2013, NSWCAT) dealt with a worker's gradual onset wrist problems. The problems were diagnosed as tendonitis and carpal tunnel syndrome. She had a significant history of manual labour (including the use of vibratory tools) with several employers, but had worked only briefly for her most recent employer. It was then that her wrist became symptomatic.

The board only considered the causal connection of the worker's wrist problems to her latest employment. However, an appeal commissioner considered her longer work history and recognized the wrist problems as compensable. The issue of an earnings loss was sent back to the board for reconsideration.

The decision was considered noteworthy because it described carpal tunnel syndrome as a disablement in the nature of an occupational disease which did not necessarily require identification of a specific employer. In other words, the worker did not have to file claims against multiple employers in order to be considered for benefits.

SURVIVOR BENEFITS

Section 60 of the act provides for compensation to be paid to survivors when a worker dies as a result of a compensable injury. A worker's estate may also be entitled to benefits which had been payable to a worker, but not received in his or her lifetime. Two appeals in this topic area presented the tribunal with novel circumstances and issues.

In *Decision 2013-187-AD* (September 19, 2013, NSWCAT), an occupational disease benefit claim was brought by a late worker's son in 2010. Three benefits were sought: a PIB; a survivor pension in favour of the late worker's dependent spouse; and a lump-sum death benefit. The board found that the claim for an occupational disease was statute barred pursuant to s. 83 of the act because the late worker had been diagnosed with mesothelioma in 2001 and passed away within a year of being diagnosed. His spouse passed away six years later.

There was no question that the mesothelioma had been related to workplace exposures to asbestos. The appeal commissioner found that the late worker's son was not aware his father's mesothelioma was work-related until shortly before the claim was filed with the board. Therefore, it was found that an application for survivor benefits was not statute-barred by s. 83 of the act.

It was determined by the board in 2010 that the worker had a 100 per cent permanent impairment effective as of the date of his diagnosis in 2001. According to s. 34(5), a permanent impairment is payable only for the lifetime of a worker to whom awarded. However, according to s. 34(6), an exception applies for a worker who dies due to the compensable injury in question prior to the determination of a 100 per cent permanent impairment. Therefore, the

appeal commissioner found that the worker's estate was entitled to the deceased worker's PIB. The benefit was to be calculated based upon a 100 per cent PMI rating from the date of diagnosis in 2001 to the date of death in 2002.

The worker's surviving spouse had been dependent upon the worker prior to his death. It was found that a lump-sum benefit was payable because the spouse was entitled to the benefit on the worker's death in accordance with s. 60 and policy 6.1.1. This was the case because the policy provides for a one-time death benefit payable to a surviving dependent spouse under the circumstances described.

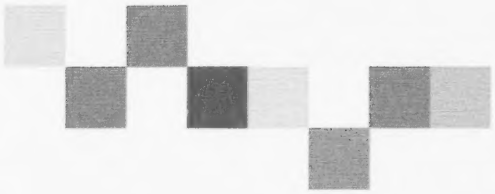
However, the appeal commissioner found there was no entitlement to a pension. A pension resulting from an injury incurred from and after February 1, 1996 (as in the case of the mesothelioma) is payable only until a worker, or his surviving spouse, reaches 65 years of age. Both the worker and his spouse had been older than age 65 in 2001 when the worker was diagnosed. Therefore, the criteria for entitlement to receipt of a pension had not been met.

The second appeal selected for comment was *Decision 2013-273-PAD* (October 28, 2013). This was a preliminary decision by a tribunal panel. The claimant for survivor benefits was a late worker's former spouse. She and the worker had divorced in 2008 and lived apart thereafter. However, she was in receipt of support payments from him to the date of his death in 2013. She argued that she was either a "dependent spouse" with an entitlement to benefits pursuant to s. 60(1)(c), or a "dependent" with an entitlement to benefits pursuant to s. 60(4).

The panel declined to accept an expansive view of the meaning of a "spouse", as defined in s. 2(ab). In its view, the word connoted a legal and familial relationship which excluded former spouses. The former spouse had not been legally married to the worker at the time of his death, nor had she cohabited with him "as husband and wife" for the time required by s. 2(ab). Therefore, she did not fit within the definition of a spouse under the act. The panel also found that the former spouse could not be a "dependent." That term was defined in s. 2(l) to mean a "member of the family." Since the 2008 divorce, the claimant was no longer a member of the late worker's family. Therefore, the panel found that the former spouse was not entitled to survivor benefits.

STATUTE-BARRED CLAIMS (S. 83) & SUSPENDED/TERMINATED BENEFITS (S. 84)

Section 83(6) of the act provides that a claim for compensation is barred if brought five or more years from the happening of an accident or the date a worker learns of an occupational disease. The worker in *Decision 2012-700-AD* (August 22, 2013, NSWCAT) experienced a psychological injury as a result of witnessing a horrific workplace mishap in 1999. He was diagnosed with post-traumatic stress disorder (PTSD) in 2000. Although he experienced panic attacks, the attacks were thought to be in remission by 2004. In 2011, he was diagnosed with a panic disorder and alcoholism (in remission).



Relying upon *Decision 2006-311-AD* (March 13, 2008, NSWCAT), an appeal commissioner characterized the worker's PTSD as a "disablement" similar to an occupational disease. As such, the appeal commissioner reasoned that the date of "accident" did not occur until there had been a loss of earnings, permanent impairment or death. Relying upon the Supreme Court of Canada's reasons in *M.(K.) v. M.(H.)* [1992], 3 S.C.R. 6, a "reasonable discovery rule" was found to apply. This postponed the commencement of a limitation period during which a claim could be brought until the worker had an awareness of the harm in question and its likely cause.

Nonetheless, ignorance of the law did not excuse the worker's delay in bringing a claim. Under the circumstances, the appeal commissioner found that the limitation period for the worker's PTSD commenced in 2000 and s. 83 barred his claim.

A second appeal in this topic area, *Decision 2013-383-AD* (December 4, 2013, NSWCAT), presented an appeal commissioner with a particularly challenging set of issues. The worker suffered a closed head injury and was awarded TERB. According to the appeal commissioner, the full extent of his injury may not have been fully appreciated.

An occupational therapist was to do an in-home assessment for the board, but the worker refused to consent to it. The refusal to consent led the board to terminate his TERB based upon non-cooperation pursuant to s. 84. This provision obligates a worker to mitigate his loss from an injury and co-operate with the board in its claim management.

However, there were a number of factors which indicated the worker might not be legally competent or able to cooperate with the board. These included the following: a treating specialist suggested the worker may be exhibiting symptoms of early psychosis; the worker failed to attend for a psychiatric assessment; a prior legal representative expressed doubts about the worker's legal capacity; and testimony from several witnesses who had a long-term involvement with the worker said that he had shown changes in behaviour and had difficulty managing his affairs. Under the circumstances, the appeal commissioner found that TERB had not been properly terminated. He reinstated the worker's TERB with the recommendation that the board guide the worker through further health care assessments or identify someone to act as the worker's legal representative.

TERB (S. 37)

Of the many TERB appeals decided this year, two decisions were selected for comment.

Decision 2012-625-AD & 2012-739-AD (May 28, 2013, NSWCAT) arose in the context of a worker laying off from work due to a shoulder injury. An initial board decision found that the worker had been entitled to TERB until the time his doctor was contacted on April 26, 2012. His doctor supported a return to work at that time, but advised that an earlier return to work would not have been appropriate.

The employer successfully appealed the initial decision to a Hearing Officer. The Hearing Officer found it persuasive that the employer made suitable transitional duties available for the worker prior to April 26, 2012. A treating physiotherapist had also approved an earlier return.

However, an appeal commissioner allowed the worker's appeal and reinstated his TERB. This was based upon findings that the worker's claim management had been ongoing and the board had not made an actual determination concerning the suitability of

transitional duties until April 26th. Therefore, even though the employer and physiotherapist were satisfied suitable transitional duties had been offered, the appeal commissioner found it was unreasonable to expect a return to modified duties when the board was not yet satisfied. Prior to April 26th, it had been seeking additional information about a return to work. The appeal commissioner further noted, "it is the board that is responsible for the management and adjudication of claim files."

Another appeal, *Decision 2013-359-AD* (December 12, 2013, NSWCAT), involved considerations similar to those discussed in *Decision 2013-377-AD* (discussed in the EERB topic area, above). The noteworthy aspect of *Decision 2013-359-AD* concerns the worker's additional evidence and an attempt to revisit a final decision denying him TERB for various periods of time. The worker argued that s. 72 of the act gave the tribunal an independent basis to review and adjust an earlier denial of TERB aside from the board's new evidence policy, 8.1.7R2.

Section 72 provides for a review and adjustment of TERB. However, the provision is engaged only after entitlement to compensation is established. An appeal commissioner found that s. 72 did not permit the worker to revisit or change the final decision. That could only be done by way of a reconsideration pursuant to s. 185(2) and policy 8.1.7R2. Since the prior denial of TERB could not be altered pursuant to s. 72, the appeal commissioner went on to consider whether the additional evidence in question was "new evidence."

PROCEDURAL QUESTIONS & MISCELLANY

In *Decision 2011-168-PAD* (June 11, 2013, NSWCAT), the central issue on appeal involved a stress claim. Prior to the hearing, an employer requested the exclusion of a workplace assessment which had investigated reports of interpersonal conflicts. The employer argued that the assessment was subject to a qualified privilege. However, the tribunal denied the pre-hearing request because the assessment was both relevant and not exempt from admission in evidence. Applying the "Wigmore test," the tribunal found that the relevance of the document outweighed concerns that individuals interviewed would be identified. The decision also discussed steps which could be taken by the tribunal to reduce privacy concerns.

Decision 2014-45-AD (March 18, 2014, NSWCAT) was mentioned in the Hearing Loss and Tinnitus topic area, above. The board awarded the worker a PIB and properly commuted his benefit pursuant to s. 74(2) of the act and policy 3.9.5. The difficulty was that the worker was not provided information concerning how the commutation was calculated. Without information such as amortization tables, the worker was unable to verify or understand the basis for the calculation. An appeal commissioner found that the failure to supply such information was contrary to principles of natural justice and the board's duty of fairness to the worker. Therefore, the board was directed to provide such information when it recalculated the worker's PMI rating and PIB.

Decision 2013-679-AD (February 27, 2014, NSWCAT) involved a worker who had been awarded a sizeable sum for a retroactive increase to his permanent medical impairment rating. The board issued a T5007 tax slip for the award. Although not taxable as earnings, the amount in question was included by the Canada Revenue Agency

when it calculated the worker's entitlement to an old age security pension for the year received.

The worker claimed the tax slip had been issued in error. He argued that the award was for non-economic loss, pain and suffering, not a disability benefit. If so, it should not have required a tax slip. However, an appeal commissioner distinguished pain and suffering under tort law from compensation benefits. He noted that there was a broad definition of compensation and income under the *Income Tax Act*. Construing the underlying nature of the worker's award as a disability benefit for tax purposes was aided by an interpretive tax bulletin, IT-202 R2. This bulletin detailed the inclusive tax treatment to be given to compensation awards. Therefore, the appeal commissioner found that the board had not erred in issuing the tax slip.

Lastly, in *Decision 2013-373-PAD* (November 27, 2013, NSWCAT), a preliminary issue was raised by an employer in its appeal to the tribunal. The employer objected to the provision of legal services by the WAP. The worker had been awarded benefits for neck and back problems which the board found to be causally related to his employment. The employer argued that the worker was not entitled to be represented by WAP on appeal because he had not been denied a benefit.

WAP is governed by Part III of the act and the *Workers' Advisers Program Eligibility Regulations*. An Acting Registrar/appeal commissioner found that the tribunal's authority was restricted to matters arising out of Part I of the act. Hence, it was not for the tribunal to determine whether a worker was eligible to be represented by WAP.

APPEALS FROM TRIBUNAL DECISIONS

The tribunal is the final decision maker in the workers' compensation system. A participant who disagrees with a tribunal decision can ask the Nova Scotia Court of Appeal to hear an appeal of the decision. An appeal must be filed with the Court within 30 days of the tribunal's decision. Under special circumstances, the Court can extend the time to file an appeal.

The Court of Appeal can only allow an appeal of a tribunal decision if it finds an error in law or an error of jurisdiction. The Court does not redetermine facts or investigate a claim.

An appeal has two steps.

First, the person bringing the appeal must seek the Court's permission to hear the appeal. This is called seeking "leave to appeal." Where it is clear to the Court that the appeal cannot succeed, it denies leave without giving reasons and no appeal takes place.

Second, if leave is granted, there is an appeal hearing and the Court will allow or deny the appeal.

During this fiscal year, 6 appeals from tribunal decisions were filed with the Court of Appeal:

- 5 decisions were appealed by workers
- 1 decision was appealed by the workers' compensation board

During this fiscal year, 10 appeals were resolved as follows:

- 2 appeals were discontinued by the party who filed the appeal
- 1 appeal was dismissed due to a failure to follow Court procedures
- leave to appeal was denied 5 times
- 2 appeals were decided by the Court of Appeal – one was allowed, the other denied

At the beginning of this fiscal year, there were 11 active appeals before the Court of Appeal. At the end of this fiscal year, there remained 6 active appeals.

Also this year, an employer sought leave to appeal a decision to the Supreme Court of Canada. The Supreme Court of Canada has refused to hear that appeal. The Court of Appeal's decision, which confirmed the tribunal's decision, remains the final decision (*Enterprise Cape Breton Corporation v. Hogan,* 2013 NSCA 33).

DECISIONS OF THE COURT OF APPEAL

The Court decided two appeals this fiscal year.

Ellsworth v. Nova Scotia (Workers' Compensation Appeals Tribunal), 2013 NSCA 131

Mr. Ellsworth sustained a compensable back injury in 1987. He had a recurrence of the 1987 injury while lifting a heavy battery at work in 2006. He did not return to work following the 2006 recurrence. He sought an extended earnings replacement benefit assessment.

The tribunal found that s. 227 of the act provides a complete code to deal with permanent benefits for injuries before March 23, 1990. As Mr. Ellsworth's injury was before 1990, and the 2006 incident was a recurrence of that injury, his claim had to be adjudicated under s. 227. As s. 227 does not allow for an extended earnings replacement benefit, Mr. Ellsworth could not be assessed for such a benefit. He was only entitled to permanent benefits as they were paid under the former act's clinical rating system benefits.

The Court of Appeal allowed Mr. Ellsworth's appeal.

The Court found the tribunal's interpretation of s. 226 to be unreasonable.

The Court stated that sections 226 and 227 provide a complete code for compensating injuries which occurred prior to March 23, 1990. However, Mr. Ellsworth also had an injury in 2006 while lifting a battery. Section 226 does not apply to an injury in 2006, regardless of whether it triggered the recurrence of an old injury.

At paragraphs 71 and 72, the Court stated:

> Section 227 addresses those individuals who are receiving compensation, and those who are "entitled" to receive compensation for a permanent disability as of February 1, 1996. What this means is that a person may have an appeal, or their claim simply has not been adjudicated for an injury that occurred prior to March 23, 1990, yet they are entitled to a permanent disability benefit as of February 1, 1996. It is the timing of the adjudication of their claim that is the issue. The Legislature was simply putting people who had their claims adjudicated and were receiving benefits on the same level as those who were entitled but had not yet been adjudicated.
>
> Read in that way, everyone injured before March 23, 1990, would be treated the same and compensated under the clinical rating system and those injured after that date would fall within the provisions of the new Act.

Veinot v. Nova Scotia (Workers' Compensation Appeals Tribunal), 2014 NSCA 12

Mr. Veinot suffers from primary lateral sclerosis, a progressive disease of the motor neurons which causes him muscular weakness and spasticity. He sought to relate his condition to a workplace injury where he fell and struck his head. The fall took place in 2005 and caused a couple of days of time loss. Mr. Veinot has been unable to work since 2009 due to his neurological condition.

The tribunal noted that Mr. Veinot believed that his neurological symptoms began from the time of the fall. However, the tribunal gave greater weight to expert opinion evidence that there was unlikely to be any relationship between a fall and developing primary lateral sclerosis. In doing so, it applied the "but for" test for causation (the legal test for causation most often used by the tribunal and by courts).

The Court of Appeal denied Mr. Veinot's appeal.

It rejected his counsel's argument that the tribunal had required scientific certainty. Instead, the tribunal had applied the correct legal tests and had not missed or misunderstood important evidence.

The Court noted at paragraph 43:

> The weighing and evaluation of evidence falls squarely within WCAT's expertise and authority. It is not our role to re-evaluate the evidence or second guess WCAT's decision.

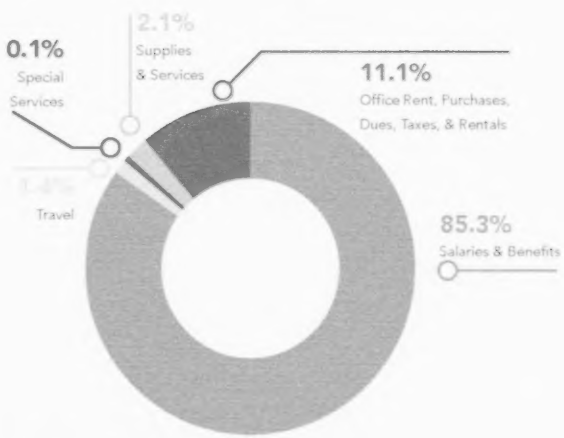
As an aside, the Court noted that the tribunal mentioned, but did not apply, the "material contribution test" for causation. The Court questioned whether the "material contribution test" still applies to workers' compensation claims in light of some recent court decisions. The Court did not decide this issue, but wrote at paragraphs 53 and 54 as follows:

> Workers' compensation is a no fault system where it is only necessary to show the injury arose out of or in the course of employment to be entitled to compensation. Whether it is the worker, a co-worker, the employer or a third party who creates the risk, would appear to be irrelevant to that analysis. The worker is entitled to recover regardless of whose act created or magnified the risk. In light of *Clements*, one may question whether "material contribution", as a test for causation, has any application in this workers' compensation context.
>
> This *Act* itself may provide an alternative to the "but for" test in s. 187. If a worker is unable to prove causation on the "but for" test, s. 187 of the Act provides an alternative to reduce the burden to one of "as likely as not."

FINANCIAL OPERATIONS

In 2013–14, the tribunal's total expenditures were within 78 per cent of the original authority and within 92 per cent of our revised forecast. Net expenditures totalled $1,656,290.30, a decrease from the previous year of $105,945.43 (see Figure 12).

FIGURE 12
BUDGET EXPENDITURES
(for the Fiscal Year Ending March 31, 2014)



APPENDIX

FIGURE 1
APPEALS RECEIVED

	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Total
Fiscal 2010–11	77	53	60	89	70	60	60	78	89	54	59	72	821
Fiscal 2011–12	58	79	83	70	69	46	82	76	79	64	55	71	832
Fiscal 2012–13	69	81	98	61	70	33	54	74	47	45	61	72	765
Fiscal 2013–14	73	77	57	42	53	58	82	88	66	58	58	75	787

FIGURE 2
DECISIONS RENDERED

	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Total
Fiscal 2010–11	49	51	52	47	49	48	52	64	41	56	50	58	617
Fiscal 2011–12	57	54	49	47	51	67	63	66	52	52	61	45	664
Fiscal 2012–13	63	78	74	58	50	53	63	67	46	69	61	32	714
Fiscal 2013–14	63	56	59	55	48	56	52	60	44	53	42	51	639

FIGURE 3
APPEALS OUTSTANDING AT YEAR END

	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar
Fiscal 2010–11	497	492	491	524	539	541	543	548	593	586	590	596
Fiscal 2011–12	590	606	632	647	657	632	638	639	659	665	653	670
Fiscal 2012–13	657	650	661	657	673	644	626	622	617	583	579	605
Fiscal 2013–14	612	626	619	597	597	589	607	628	646	647	656	670

FIGURE 4
TIMELINESS TO DECISION (CUMULATIVE PERCENTAGE BY MONTH)

Months	1	2	3	4	5	6	7	8	9	10	11	>11
Fiscal 2010–11	0.97	5.02	18.96	35.82	47.97	57.05	64.99	72.45	77.15	82.50	84.76	100
Fiscal 2011–12	0.60	4.82	20.33	33.73	44.58	51.96	60.84	66.42	72.14	76.51	79.82	100
Fiscal 2012–13	0.42	3.78	12.89	27.03	41.04	51.40	57.42	63.45	69.61	72.83	74.79	100
Fiscal 2013–14	0.31	2.66	8.76	20.50	33.33	42.88	49.14	54.46	59.78	64.32	68.08	100

FIGURE 5
DECISIONS BY REPRESENTATION

Self-Represented	79
Workers' Advisers Program	390
Injured Worker Groups, Outside Counsel & Others	170

FIGURE 6
DECISIONS BY ISSUE CATEGORIES – WORKER

Recognition of Claim	202
New/Additional Temporary Benefits	135
New/Increased Benefits for Permanent Impairment	226
Medical Aid (Expenses)	97
New/Additional Extended Earnings Replacement Benefits	80
New Evidence	44
Chronic Pain	74
Termination of Benefits for Non-Compliance	16
All Other Issues	79
Total	953

FIGURE 7
DECISIONS BY ISSUE CATEGORIES – EMPLOYER

Acceptance of Claim	4
Extent of Benefits	7
Assessment Classification	0
Assessment Penalties	0
Other Claims Issues	0
Other Assessment Issues	2
Total	13

FIGURE 8
DECISIONS BY MODE OF HEARING

	Oral Hearings	Written Submissions	Total
Fiscal 2010–11	460	157	617
Fiscal 2011–12	421	243	664
Fiscal 2012–13	414	300	714
Fiscal 2013–14	387	252	639

FIGURE 9
DECISIONS BY OUTCOME

Allowed	217
Allowed in Part	94
Denied	243
S29	0
RTH	83
Moot	2
Total Final Decisions	639
Appeals Withdrawn	82
Total Appeals Resolved	721

FIGURE 10
DECISIONS BY APPELLANT TYPE

Worker Claim Appeals*	623
Employer Claim Appeals	14
Employer Assessment Appeals	2
Section 29 Applications	0
Total	639

*Employer participation in Worker appeals 28%

FIGURE 11
APPEALS BEFORE THE COURTS AT YEAR END

	Nova Scotia Court of Appeal	Supreme Court of Canada	Total
Fiscal 2010–11	11	0	11
Fiscal 2011–12	17	0	17
Fiscal 2012–13	11	0	11
Fiscal 2013–14	6	0	6

FIGURE 12
BUDGET EXPENDITURES
(for the Fiscal Year Ending March 31, 2014)

	Authority	Final Forecast	Actual Expenditures
Salaries & Benefits	$1,700,000.00	$1,451,400.00	$1,412,924.87
Travel	$56,000.00	$56,000.00	$23,401.54
Special Services	$85,000.00	$15,000.00	$1,620.76
Supplies & Services	$60,000.00	$60,000.00	$34,183.48
Office Rent, Purchases, Dues, Taxes, & Rentals	$210,000.00	$207,900.00	$184,159.65
Sub Total	$2,111,000.00	$1,790,300.00	$1,656,290.30
Less Recoveries	$0.00	$0.00	$0.00
Totals	$2,111,000.00	$1,790,300.00	$1,656,290.30